

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

10	GAYLE CARVER,)	
11	Plaintiff,)	No. CV-04-3105-CI
12	v.)	ORDER GRANTING PLAINTIFF'S
13	JO ANNE B. BARNHART,)	MOTION FOR SUMMARY JUDGMENT
14	Commissioner of Social)	AND REMANDING FOR AN IMMEDIATE
15	Security,)	AWARD OF BENEFITS
16	Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 11, 18), submitted for disposition without oral argument on May 16, 2005.¹ Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Richard M. Rodriguez represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands for an immediate award of benefits.

¹The matter has been heard on an expedited basis because the briefing was complete.

1 Plaintiff filed an application for Widow's Insurance Benefits
2 on November 9, 2000, claiming benefits based on the account of her
3 deceased former spouse, Michael Widmier. (Tr. at 13.) At the time
4 of application, she was 64 or 65 years of age and had not remarried.
5 (Tr. at 44.) The application was denied initially and upon
6 reconsideration. Following a hearing before Administrative Law Judge
7 Arnold Battise, benefits were awarded. On its own motion, the
8 Appeals Council reviewed and reversed the ALJ's decision. (Tr. at
9 7-9.) This appeal followed. Jurisdiction is appropriate pursuant
10 to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c)(3).

11 THE APPEALS COUNCIL DECISION

12 The Appeals Council reviewed the ALJ's decision, noting there
13 was an error of law and insufficient evidence to support the
14 findings of fact. (Tr. at 7.) The Appeals Council ruled Plaintiff
15 was not entitled to widow's benefits as the divorced spouse of the
16 deceased wage earner because she was not married to Mr. Widmier for
17 at least 10 years immediately before they were divorced, citing
18 section 216(d)(2) of the Social Security Act. The Appeals Council
19 further found Plaintiff and Mr. Widmier were first married on
20 October 4, 1965 and divorced on November 7, 1974. They were
21 remarried on February 29, 1976, and divorced again on July 18, 1985.
22 Neither marriage lasted for a total of ten consecutive years.

23 ISSUES

24 The question presented is whether the decision of the Appeals
25 Council is an error of law. The facts are not in dispute.

26 ANALYSIS

27 Relying on the Program Operations Manual System (POMS) section
28 RS 00202.005 and principles of equity, the ALJ concluded "[t]he

1 claimant is the surviving divorced spouse of the wage earner as that
2 term is defined in the Regulations (20 C.F.R. § 404.336(a)(2))."
3 (Tr. at 16.) He further concluded the marriage had existed for 18
4 of the 20 years immediately prior to the second dissolution on July
5 18, 1985. (Tr. at 15.)

6 In *Bowen v. Owens*, 476 U.S. 340, 345 (1986), the Supreme Court
7 stated:

8 The program is a massive one, and requires Congress to
9 make many distinctions among classes of beneficiaries
10 while making allocations from a finite fund. In that
11 context, our review is deferential. "Governmental
12 decisions to spend money to improve the general public
13 welfare in one way and not another are 'not confided to
14 the courts. The discretion belongs to Congress, unless the
15 choice is clearly wrong, a display of arbitrary power, not
16 an exercise of judgment.'" *Mathews v. De Castro*, 429 U.S.
17 181, 185 (1976), quoting *Helvering v. Davis*, 301 U.S. 619,
18 640, (1937). As this Court explained in *Flemming v.*
19 *Nestor*, 363 U.S. 603, 611 (1960):

20 Particularly when we deal with a withholding of
21 a noncontractual benefit under a social welfare
22 program such as [Social Security], we must
23 recognize that the Due Process Clause can be
24 thought to interpose a bar only if the statute
25 manifests a patently arbitrary classification,
26 utterly lacking in rational justification.

27

28 We have previously noted that "[t]he entitlement of any
secondary beneficiary is predicated on his or her
relationship to a contributing wage earner." *Califano v.*
Jobst, 434 U.S. 47, 52 (1977). In determining who is
eligible for such benefits, the scope of the program does
not allow for "individualized proof on a case-by-case
basis." *Ibid.* Congress "has elected to use simple
criteria, such as age and marital status, to determine
probable dependency." *Ibid.* In particular, Congress has
used marital status as a general guide to dependency on
the wage earner: "The idea that marriage changes
dependency is expressed throughout the Social Security
Act." *Id.*, at 52, n. 8.

When Congress first began to make divorced wives eligible
for wives' benefits in 1965, it focused on that group of
divorced wives whose marriages ended after many years,
when they might be "too old to build up a substantial

1 social security earnings record even if [they] can find a
 2 job." H.R.Rep. No. 213, 89th Cong., 1st Sess., 107-108
 3 (1965). To that end, divorced wives were eligible for
 4 wife's benefits only if they had been married to the wage
 5 earner for 20 years and received substantial support from
 6 him. It was not until 1972 that Congress dropped the
 7 requirement of showing support from the wage earner. Even
 8 then, Congress retained the 20-year marriage requirement.
 9 Congress has made the same distinctions in its treatment
 10 of divorced widowed spouses. When they first became
 11 eligible for survivor's benefits in 1965, it was under the
 12 same basic eligibility rules that applied to divorced
 13 spouses. During the relevant time of this lawsuit,
 14 divorced spouses and divorced widowed spouses had to have
 15 been married to the wage earner for at least 10 years to
 16 receive benefits.

17 In response to the Congressional changes extending benefits to
 18 the divorced widowed spouses, states and regulations were passed.
 19 The applicable statute is found at 42 U.S.C. § 416² and regulations
 20 at 20 C.F.R. § 404.336.³ Defendant contends the use of the word

21 ²Section 416 of 42 U.S.C. provides:

22 (d) Divorced spouses; divorce
 23 ...

24 (2) The term "surviving divorced wife" means a woman
 25 divorced from an individual who has died, but only if she
 26 had been married to the individual for a period of 10
 27 years immediately before the date the divorce became
 28 effective.

³20 C.F.R. § 404.336 states:

We will find you entitled to widow's or widower's benefits
 as the surviving divorced wife or the surviving divorced
 husband of a person who died fully insured if you meet the
 requirements in paragraphs (a)... of this section:

(a) You are the insured's surviving divorced wife or
 surviving divorced husband and you meet both of the
 conditions in paragraphs (a)(1) and (2) of this section:

(1) You were validly married to the insured under
 State law as described in § 404.345 or are deemed to have
 been validly married as described in §404.346

1 "immediately" is reasonably interpreted by the agency as
2 consecutive. Additionally, decisions by agency personnel are guided
3 by reference to the POMS, § RS 00202.005.⁴ The only dispute is the
4 application of the ten year duration requirement to the specific
5 facts before the court.

6 It is undisputed the marriages do not qualify under a strict
7 reading of the POMS as the date of the divorce which interrupted the
8 marriage was not followed by a re-marriage within the following
9 calendar year. Rather, the first divorce occurred on November 7,
10 1974, followed by the re-marriage on February 29, 1976. However,
11 the ALJ interpreted this separation as comprising some 16 months;
12 under the POMS, a couple theoretically divorced on January 1 and
13 remarried on December 31 of the following year would have been
14 separated for more than 23 months. Thus, but for the specific
15 timing of Plaintiff's first dissolution and later re-marriage, e.g.
16 had the divorce occurred on March 7, 1974, followed by re-marriage
17 on July 29, 1975, (the same number of months of separation) there
18 would be no question of qualification under the POMS for benefits.

20 (2) You were married to the insured for at least 10
21 years immediately before your divorce became final.

22 ⁴POMS section RS 00202.005 provides:

23 A divorced spouse must (1) be finally divorced from the
24 NH; and (2) have been married to him/her for a period of
25 at least 10 years immediately before the date the divorce
26 became final. This requirement is met if the divorce
27 became final on or after the tenth anniversary of the
28 marriage. This is so even if this period was interrupted
by a prior divorce, provided the remarriage took place no
later than the calendar year immediately following the
calendar year of the divorce. Even when this requirement
was not met with respect to the claimant's last divorce,
she/he may qualify based on a 10-year period of marriage
immediately before a prior divorce.

1 The Social Security Act is remedial and is to be liberally
2 construed. *Doran v. Schweiker*, 681 F.2d 605, 607 (9th Cir. 1982).
3 Moreover, the POMS do not have the force and effect of law. *Lowry*
4 *v. Barnhart*, 329 F.3d 1019, 1022-23 (9th Cir. 2003). The POMS
5 example is only that and cannot trump the spirit and intent of
6 Congress.

7 The only cases to interpret this specific issue involve
8 marriages that were days shy of ten years. *Albertson v. Apfel*, 247
9 F.3d 448 (2nd Cir. 2001) (benefits denied where marriage was
10 dissolved three days shy of the tenth anniversary); *George v.*
11 *Sullivan*, 909 F.2d 857 (6th Cir. 1990) (benefits denied where divorce
12 occurred just seven days shy of ten year duration even in light of
13 *nunc pro tunc* decree amending final divorce decree date to within
14 the applicable time frame). However, in neither of these two cases
15 were re-marriages at issue; in both cases, the total length of the
16 union between the spouses was shy of ten years. That is not the
17 case here; the total length of marital union was 18 years and
18 included the birth and development of the couple's seven children.
19 There are no cases cited by the parties which involve remarriage.
20 This scenario fits well within the spirit of Congressional intent as
21 outlined in *Owens* and within the short-term dissolution period
22 contemplated by the POMS. Accordingly,

23 **IT IS ORDERED:**

24 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 11**) is
25 **GRANTED**; the matter is **REMANDED** for an immediate award of benefits.

26 2. Defendant's Motion for Summary Judgment dismissal (**Ct. Rec.**
27 **18**) is **DENIED**.

28 3. Any application for attorney fees shall be filed by
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1 separate Motion.

2 4. The District Court Executive is directed to file this
3 Order and provide a copy to counsel for Plaintiff and Defendant.
4 The file shall be **CLOSED** and judgment entered for Plaintiff.

5 DATED May 6, 2005.

6
7
8 s/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE